NO. 89-1154

Supreme Court, U.S.
FILED
DEC 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

SHELL OFFSHORE INC.,
Petitioner,

VERSUS

ROBERT GATES, TOTAL SERVICES, INC.
and NORTHWEST INSURANCE COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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LISTING OF PARENT, SUBSIDIARY, AND AFFILIATED CORPORATIONS

The "Shell" Transport and Trading Company, PLC
(Co-parent of Shell Petroleum)

Royal Dutch Petroleum Company
(Co-parent of Shell Petroleum)

Shell Petroleum, N.V. (Parent of SPNV)

SPNV Holdings, Inc. (Parent of Shell Oil Company)

Shell Oil Company (Parent of SERI)

Shell Energy Resources, Inc. (Parent of SOI)

Shell Offshore Inc.

Shell Western E&P Inc. (Affiliated Corporation of SOI)

Crown Central Petroleum Corporation
(Joint Venturer with SOI in offshore lease)

Strata Energy, Inc.
(Joint Venturer with SOI in offshore lease)

HNG Oil Company
(Joint Venturer with SOI in offshore lease)

OCFOGO, Inc.
(Joint Venturer with SOI in offshore lease)

POGO Producing Company
(Joint Venturer with SOI in offshore lease)

QUESTIONS PRESENTED FOR REVIEW

Petitioner applies for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit for review of the following questions:

I. Do the Outer Continental Shelf Lands Act and 28 U.S.C. 1961 allow an award of prejudgment interest on future damages?

(a) Must a federal court, sitting pursuant to the Outer Continental Shelf Lands Act, adopt as surrogate federal law a patently absurd state law?

STATEMENT OF INTERESTED PARTIES

I, J. Daniel Picou, counsel of record for Petitioner, Shell Offshore Inc., certify that the following listed persons have or may have an interest in the outcome of this case:

(1) Robert Gates
(2) William Rutledge
(3) Domengeaux & Wright
(4) J. Daniel Picou
(5) Leininger, Larzelere & Picou
(6) Arthur A. Crais, Jr.
(7) Shell Offshore Inc.
(8) Total Services, Inc.
(9) Northwest Insurance Company

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DECISIONS BELOW

(1) Judgment of the United States District Court for the Eastern District of Louisiana, entered March 31, 1988.

(2) Amended Judgment of the United States District Court for the Eastern District of Louisiana, dated April 12, 1988.

(3) Minute Entry of the United States District Court for the Eastern District of Louisiana, dated June 10, 1988.

(4) Opinion of the United States Court of Appeals for the Fifth Circuit, dated August 19, 1989.

(5) Order of the United States Court of Appeals for the Fifth Circuit denying Shell's Petition for Rehearing and Suggestion for Rehearing En Banc, dated October 2, 1989.

JURISDICTION

The entry date of the Opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed herein is August 29, 1989.

The date of the Order of the United States Court of Appeals for the Fifth Circuit denying Shell's Petition for Rehearing and Suggestion for Rehearing En Banc is October 2, 1989.

Jurisdiction in the District Court properly was based upon the Outer Continental Shelf Lands Act, 43 U.S.C. 1331, *et seq.*

Jurisdiction in the United States Court of Appeals for the Fifth Circuit properly was based upon 28 U.S.C. 1291.

Jurisdiction before this Court is pursuant to Supreme Court Rule 17.

STATUTES INVOLVED

(1) The Outer Continental Shelf Lands Act, 43 U.S.C. 1331, *et seq.*

(2) 28 U.S.C. 1961

(3) LSA-R.S.13:4203

STATEMENT OF THE CASE

Gates brought suit under the Outer Continental Shelf Lands Act against Shell Offshore Inc. for recovery of damages for personal injuries he allegedly sustained while working on a fixed platform owned by Shell Offshore Inc. and located on the outer continental shelf off the coast of Louisiana.

Trial of this matter was held on March 14 and 15, 1988. The jury returned a verdict, finding the defendant 80% at fault and the plaintiff 20% at fault. The jury awarded damages totaling $682,500, of which $435,000 was awarded for future damages. The gross award was reduced to $546,000, based upon the jury's assessment of comparative fault. Judgment was entered on March 31, 1988.

Shell then brought a Motion for Judgment Notwithstanding the Verdict, or in the Alternative, to Set Aside the Verdict and Grant a New Trial, or in the Alter-

native, for Remittitur.

Gates sought amendment of the Judgment, claiming that he was entitled to prejudgment interest, *pursuant to state law,* from the date of judicial demand on all amounts, including the amounts awarded for loss of future damages. Gates relied upon a Louisiana statute, LSA-R.S.13:4203.

The District Court issued an Amended Judgment on April 12, 1988. Shell contested the issue of the award of prejudgment interest, and on June 10, 1988, the District Court issued a Minute Entry noting that Gates was not entitled to prejudgment interest on any amounts awarded for future damages. Also on June 10, 1988, a Minute Entry was entered denying Shell's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, to Set Aside the Verdict and Grant a New Trial, or in the Alternative, for Remittitur.

Both Gates and Shell appealed from the ruling on June 10, 1988, to the United States Court of Appeals for the Fifth Circuit. Gates' appeal was limited to the issue of whether he was entitled to prejudgment interest on amounts awarded for future damages.

Shell appealed from the original judgment entered on March 31, 1988, and from the Order denying its Motion for Judgment Notwithstanding the Verdict, or in the Alternative, to Set Aside the Verdict and Grant a New Trial, or in the Alternative, for Remittitur.

On August 29, 1989, the United States Court of Appeals for the Fifth Circuit issued an opinion affirming all aspects of the Judgment, except that aspect dealing with the issue of prejudgment interest on the award for future damages. The United States Court of Appeals for the Fifth

Circuit reversed in part, and remanded on the issue of prejudgment interest on future damages. It ruled that Gates is entitled to prejudgmcnt interest on an award of future damages, pursuant to Louisiana law, LSA-R.S.13:4203.

Shell filed a Petition for Rehearing and Suggestion for Rehearing En Banc. On October 2, 1989, the United States Court of Appeals for the Fifth Circuit denied Shell's Petition for Rehearing and Suggestion for Rehearing En Banc.

Shell seeks a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and urges that Gates is not entitled to prejudgment interest on the award for future damages.

ARGUMENT

As noted above, the United States Court of Appeals for the Fifth Circuit ruled that in an Outer Continental Shelf Lands Act case plaintiff is entitled to prejudgment interest on an award for future damages, following Louisiana law. However, Shell Offshore Inc. urges that the Outer Continental Shelf Lands Act and 28 U.S.C. 1961 do not allow an award of prejudgment interest on future damages. The Louisiana law in question is in conflict with federal law and should not be adopted as surrogate federal law. Shell also urges that a federal court, sitting pursuant to the Outer Continental Shelf Lands Act, is not constrained to adopt as surrogate federal law, and it should reject, a patently absurd state law.

I. Do the Outer Continental Shelf Lands Act and 28 U.S.C. 1961 allow an award of prejudgment interest on future damages?

This action was brought by Gates under the Outer Continental Shelf Lands Act, 43 U.S.C. 1331, *et seq.* (hereinafter referred to as the OCSLA). Section 1333 provides in pertinent part:

> "(1) The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, *to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State...*
>
> (2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in

> the Federal Register such projected lines extending seaward and defining each such area. . . ." (Emphasis added)

In *Rodrigue v. Aetna Casualty and Surety Company*, 395 U.S. 353, 89 S.Ct. 1835 (1969), this Court addressed the applicability of state law in an OCSLA case. It stated:

> "The Lands Act makes it clear *that federal law, supplemented by state law of the adjacent State, is to be applied to these artificial islands as though they were federal enclaves in an upland State.*" (Emphasis added)

395 US. 356, 89 S.Ct. 1837.

In *Rodrigue* this Court also stated that the law to be applied in an OCSLA case is federal law of the United States, "applying state law only as federal law and then only when not inconsistent with applicable federal law, ..."

It further noted in *Rodrigue* that federal law is "exclusive." 395 U.S. 357, 89 S.CT. 1838.

Therefore, there is no question that federal law applies exclusively in this case. However, the United States Court of Appeals for the Fifth Circuit mechanically adopted as surrogate federal law a patently absurd Louisiana law. The statute in question, LSA-R.S.13:4203, apparently allows prejudgment interest, from the date of judicial demand, on all amounts awarded in a tort action, *including amounts awarded for future damages.* The principle, allowing prejudgment interest on an award for future damages, has been criticized and rejected in cases involving maritime law and in other cases.

The purpose of an award of prejudgment interest

was explained by this Court in *West Virginia v. United States,* 107 S.Ct. 702 (1987). At footnote 2, this Court stated:

> "Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress."

However, future damages accrue and are measured at the time of trial, not when the suit is filed. Therefore, it makes no legal or economic sense to allow prejudgment interest on an award of future damages.

The issue of prejudgment interest has also been addressed by the Third Circuit. In *Poleto v. Consolidated Rail Corporation,* 826 F.2d 1270 (3rd Cir. 1987), the Third Circuit, in discussing a case arising under the FELA, recognized that an award for future economic loss should be excluded from prejudgment interest. At footnote 14, it stated in part:

> "Future economic harms must similarly be excluded from the adjustment of prejudgment interest, for interest adjustment would be antithetical to adjusting such a future stream of money to its present value. The Supreme Court requires that, for example, the portion of the verdict that is awarded to compensate for the loss of earning power must be reduced to present value dollars."

826 F.2d 1278, footnote 14.

The Louisiana statute apparently compelling such an award of prejudgment interest certainly is inconsistent

with federal law. This Court, in *Monessen Southwestern Railway Co. v. Morgan*, 108 S.Ct. 1837 (1988), recognized that 28 U.S.C. 1961 does not explicitly authorize prejudgment interest. At footnote 8 it noted Congress' recent consideration of the issue and stated:

> "Congress considered a proposal to authorize prejudgment interest under the general federal interest statute, 28 U.S.C. 1961, during deliberations on the Federal Courts Improvement Act of 1982, Pub. L. 97-164, 96 Stat. 25. The proposal was omitted from the final legislation. S.Rep. No. 97-275, pp. 11-12 (1981)."

Further, it is clear that prejudgment interest is not allowed on an award of future damages under maritime law. In *Martin v. Walk, Haydel & Associates, Inc.*, 794 F.2d 209 (5th Cir. 1986), the Fifth Circuit restated its binding rule that prejudgment interest may not be awarded on future damages. It stated:

> "Permitting a recovery of interest on losses not yet incurred effectively grants the recipient a double recovery."

794 F.2d 212.

In *Wyatt v. Penrod Drilling Co.*, 735 F.2d 951 (5th Cir. 1984), the Fifth Circuit again rejected an award of prejudgment interest on future damages. It stated:

> "Prejudgment interest is not necessary to compensate the plaintiff for losses which have not accrued at the time judgment is entered."

735 F.2d 955, footnote 3.

It also stated:

> "Nothing in this opinion, of course, abrogates the well considered rule that prejudgment interest may not be awarded with respect to future damages."

735 F.2d 956, footnote 4.

In *Pickle v. International Oilfield Divers, Inc.*, 791 F.2d 1237 (5th Cir. 1986), the Fifth Circuit reasoned, in refusing to allow prejudgment interest on future damages:

> "Moreover, Pickle's argument ignores the basic rationale for denying interest on post-judgment losses: a victorious plaintiff has not suffered any delay in payment of those items, whether they have been discounted to present value or not, and hence there should be no prejudgment interest allowed on them."

791 F.2d 1241.

Shell Offshore Inc. suggests that not only is the Louisiana law inconsistent with prior federal court rulings, and inconsistent with the purpose of prejudgment interest as recognized by this Court, it is inconsistent with 28 U.S.C. 1961 and Congress' intent not to authorize such an award in its refusal to authorize prejudgment interest under 28 U.S.C. 1961.

Indeed, the Fifth Circuit has recognized that there was no gap to be filled by the Louisiana interest statute. In *Aymond v. Texaco, Inc.*, 554 F.2d 206 (5th Cir. 1977), a case arising under the OCSLA, the trial court awarded interest from the date of judgment, pursuant to 28 U.S.C. 1961. The plaintiff contended that he was entitled to interest under Louisiana law from the date of judicial demand. Taking note of the OCSLA and this Court's decision in *Rodrigue, supra*, the Fifth Circuit concluded:

> "Thus, this action was in federal court under the Lands Act, not the diversity statute, in a manner indistinguishable from the *Berry* action, and, as in *Berry,* there are no gaps in the federal law on computation of interest to be filled by the Louisiana interest statute."

554 F.2d 212.

In *Berry v. Sladco, Inc.,* 495 F.2d 523 (5th Cir. 1974), a case arising under the OCSLA, the Fifth Circuit also took note of the OCSLA and this Court's decision in *Rodrigue.* It concluded:

> "The tenets of Rodrigue make firm the conclusion that 28 U.S.C. 1961 controls the applicable time period for determining interest in this case. Section 1961 provides in relevant part that, 'interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State Law.' This is a positive statement of federal law, obligatory in its terms, and as such is controlling in an action brought under the Lands Act. See *Chevron Oil Co. v. Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). Moreover, permitting interest to accrue from judicial demand would certainly be inconsistent with the result provided by Section 1961. The district court was correct in limiting interest from the date of its judgment. Accordingly, the judgment of the district court is affirmed."

495 F.2d 528.

(a) **Must a federal court, sitting pursuant to the Outer Continental Shelf Lands Act, adopt as surrogate federal law a patently absurd state law?**

Intertwined with the issue of whether the OCSLA and 28 U.S.C. 1961 allow an award of prejudgment interest on future damages is the issue of what is the proper role of the federal court, sitting pursuant to the OCSLA, in its consideration of state law. Stated in another manner, the question is whether a federal court, sitting pursuant to the OCSLA, *must* adopt as surrogate federal law a patently absurd state law.

The issue has been raised previously but neither explained nor resolved. In *Knapp v. Chevron U.S.A., Inc.*, 781 F.2d 1123 (5th Cir. 1986), the Fifth Circuit recognized that in an OCSLA court the federal court does not sit as an *Erie* court. In recognizing this Court's decision in *Rodrigue, supra*, the Fifth Circuit stated:

> "We therefore do not here sit as an *Erie* court. We are a *Lands Act* court. The difference between the two courts, albeit not defined, has been alluded to. The Supreme Court observed in a matter involving Louisiana law and the Lands Act: 'This is not to imply that a federal court adjudicating a claim under state law as absorbed in the Lands Act must function as it would in a diversity case.' *Chevron Oil Co. v. Huson*, 404 U.S. 97, 103 n. 5, 92 S.Ct. 349, 353 n. 5, 30 L.Ed.2d 296 (1971). When the *Huson* case wended its way through our court, Chief Judge Emeritus Brown pointedly commented about the role of a federal court in a Lands Act case: 'It is most certainly not just an *Erie* Court of the state in which it sits.' *Huson v. Otis Engineering Corp.*, 430 F.2d 27, 30 (5th Cir.

1970). See Olsen v. Shell Oil Co., 708 F.2d 976 (5th Cir. 1983).

> "It may be that a Lands Act court has more discretion and broader authority in its evaluation, analysis, and application of state law to a given fact situation than an *Erie* court. We are inclined to so believe. It may be that a Lands Act court may more readily reject the interpretation and/or application of state law by an intermediate state appellate court than an *Erie* court."

781 F.2d 1129.

Shell submits that a court sitting pursuant to the OCSLA is not constrained to adopt as surrogate federal law an absurd state law, the principle of which has been criticized roundly. In an OCSLA action the court should have the power to reject an application of a state law which would lead to a result not contemplated by Congress and inconsistent with other federal law. As stated by the Fifth Circuit in *Knapp,* an OCSLA court is not an *Erie* court, which must follow state substantive law. Rather, an OCSLA court is a federal court, applying federal law *exclusively,* and therefore it does and must have the power to refuse to apply a state law or a portion of a state law which is inconsistent with federal law.

CONCLUSION

Shell Offshore Inc. urges that the Outer Continental Shelf Lands Act and 28 U.S.C. 1961 do not allow an award of prejudgment interest on future damages. Allowing prejudgment interest on future damages is legally and economically absurd, because it is in conflict with the principle supporting prejudgment interest. The Louisiana statute in question is inconsistent with federal law, and should not be applied as surrogate federal law. Finally, a

federal court, sitting pursuant to the Outer Continental Shelf Lands Act, does have, and must have, the power to refuse to apply a state law or a portion of a state law which is absurd or inconsistent with federal law. Shell requests that a writ of certiorari be granted and that this Court rule that in an Outer Continental Shelf Lands Act case a plaintiff is not entitled to prejudgment interest on an award of future damages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 28th day of December, 1989, served a copy of the foregoing pleading on counsel for all parties to these proceedings by placing same in the United States Mail, properly addressed and First Class postage prepaid.

APPENDIX

(1) APPENDIX A: Opinion of the United States Court of Appeals for the Fifth Circuit, dated August 29, 1989.

(2) APPENDIX B: Order of the United States Court of Appeals for the Fifth Circuit denying Shell's Petition for Rehearing and Suggestion for Rehearing En Banc, dated October 2, 1989.

(3) APPENDIX C: 43 U.S.C. 1333

(4) APPENDIX D: 28 U.S.C. 1961

(5) APPENDIX E: LSA-R.S.23:4203

APPENDIX A

Robert M. GATES, Plaintiff-Appellant, Cross-Appellee,

v.

NORTHWEST INSURANCE COMPANY, Intervenor-Cross-Appellee,

v.

SHELL OFFSHORE INC., (Substituted as Party Defendant for Shell Oil), Defendant-Appellee, Cross-Appellant.

No. 88-3414.

United States Court of Appeals,
Fifth Circuit.

Aug. 29, 1989.

Pipefitting contractor's employee brought action against platform owner to recover for injuries sustained when trying to lift and move equipment at direction of owner's employee. The United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., granted owner's motions for judgment notwithstanding verdict and new trial. Appeal was taken. The Court of Appeals, 812 F.2d 1509, reversed grant of motion for judgment notwithstanding verdict, affirmed grant of new trial, and remanded. On remand the District Court, Ivan L.R. Lemelle, United States Magistrate, disallowed prejudgment interest on future damages award and denied owner's motions for directed verdict, judgment notwithstanding verdict, or new trial. Appeal and cross appeal were taken.

The Court of Appeals, Duhe, Circuit Judge, held that: (1) prior Court of Appeals' decision that conversation between platform owner's employee and pipefitting contractor's employee created jury question as to owner's negligence was law of the case; (2) evidence supported award of damages; and (3) prejudgment interest could be awarded on future damage award under Outer Continental Shelf Lands Act.

Affirmed in part, reversed in part, and remanded.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before POLITZ, DAVIS, and DUHE, Circuit Judges.

DUHE, Circuit Judge:

I. *Facts and Procedural History*

This case is before us for the second time. In *Gates v. Shell Oil*, 812 F.2d 1509 (5th Cir. 1987)("Gates I"), we reversed the trial court's grant of Shell's motion for judgment notwithstanding the verdict and affirmed its alternative grant of Shell's motion for a new trial. Since a detailed recitation of the facts is found in Gates I, we only reiterate those facts that bear significantly on the present appeal.

In 1982, Shell hired Total Services, Inc. ("TSI") to install piping onn its platform that was under construction on the Outer Continental Shelf ("OCS") off the Louisiana coast. Gates, a TSI pipefitter, injured his back when he and Louis Erwin, a Shell employee, tried to lift and move a

valve assembly. Gates sued Shell under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. 1331-1356, claiming that Erwin caused his injuries by negligently ordering him to pick up the valve assembly.

Substantially the same evidence was presented at both the first and second trial. Gate's account of the accidnet is a follows:

> [Erwin] came up to me and asked if I needed any help with this valve, and I told him no, that I was waiting. He just turned around and started walking away, and he came back for me and then he told me, "Come on, me and you can lift this valve." ... I grabbed a hold of it and he grabbed it [and as we lifted, I hurt my back].

There was testimony from a TSI employee that "Shell people working on the platform could tell any contractor or anybody else that was working on there what to do." Erwin testified that he was only trying to assist Gates because it appeared that he was trying to move the valve by himself.

At the conclusion of the second trial the jury found Shell negligent and Gates contributorily negligent. On Shell's motion, the trial court disallowed prejudgment interest on the future damages awarded Gates appeals.

At the conclusion of Gates' case and its own, Shell's motions for a directed verdict were denied. After the verdict, Shell moved for JNOV or, alternatively, for a new trial. These motions were likewise denied. Shell cross-appeals.

II. *Directed Verdict, J.N.O.V, and New Trial*

[1] A directed verdict or JNOV should only be granted when the facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict. *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969)(*en banc*).

[2] Shell argues that Erwin's conversation with Gates immediately prior to Gates' accident is insufficient to support a finding of negligence. In Gates I, this Court stated:

> Upon review of all the evidence, we find that a reasonable jury, viewing the evidence most favorably to Gates, could have found that Shell was negligent and that its negligence proximately caused Gates' injury.
>
> Specifically, the jury could have believed that Erwin ordered Gates to lift the valve, that Gates reasonably believed that he had to obey Erwin's order, and that Erwin should have known that the valve was too heavy for the two of them to lift safely.

Id at 1512.

Our decision in Gates I that Erwin's conversation with Gates was sufficient to create a jury question "establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case at both the trial and appellate levels unless the evidence at a subsequent trial was substantially different, the controlling authority has since made a contrary decision of law applicable to such issues, or the decision was clearly

erroneous and would work a manifest injustice." *Schexnider v. McDermott Intern, Inc.*, 868 F.2d 717, 718-19 (5th Cir. 1989)(*citing White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967)); *see also Williams v. City of New Orleans*, 763 F.2d 667, 669 (5th Cir. 1985).

The evidence adduced at the second trial concerning Erwin's "order" was substantially the same as the evidence we found sufficient to create a jury issue in Gates I, the controlling law has not changed, and no manifest injustice would result by rejecting Shell's appeal. We therefore affirm the trial court's denial of Shell's directed verdict and JNOV motions.

[3-5] We also affirm the trial court's denial of Shell's motion for a new trial. The trial court's decision on a new trial motion for lack of evidentiary support is subject to review only for an abuse of descretion, *Spurlin v. General Motors Corp.*, 528 F.2d 612, 620 (5th Cir. 1976), and the trial court may not grant a new trial unless the verdict is "against the great weight of the evidence." *See generally* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2806 (1973). In support of its argument, Shell contends that evidence of TSI's negligence was ignored by the jury. As factfinder, the jury is entitled to disbelieve this evidence. Here, we find that the trial court did not abuse its discretion. The same evidence that supports the trial court's denial of Shell's motions for a directed verdict and JNOV support the denial of Shell's motion for a new trial.

III. *Jury Instructions*

[6] The trial court charged the jury as follows:

> The plaintiff asserts a claim for damages against the defendant Shell Offshore . . . for negligence

> . . . in its capacity as a platform owner. Specifically, the plaintiff contends that the defendant's conduct was negligent in that the defendant failed to exercise ordinary care under the circumstances to furnish the plaintiff with a reasonably safe place in which to work. The plaintiff claims that the defendant was negligent in one or more of the following particulars. One, that the defendant was negligent in improperly ordering the plaintiff to lift the valve assembly and two, that having ordered the plaintiff to lift the valve, defendant was negligent in failing to provide reasonable assistance to plaintiff to lift the valve assembly. The word order means any instruction or direction that under all the circumstances a prudent man should reasonably forsee that a reasonable person would comply with. An order does not have to be in writing or take any particular form.

First, Shell complains that the trial court erred by charging that Shell could be found negligent for "fail[ing] to exercise ordinary care under the circumstances to furnish the plaintiff with a reasonably safe place to work. . . . ." Even if we accept, *arguendo,* the validity of Shell's challenge, we must consider "the charge as a whole to determine whether the jury was misled and whether it understood the issues presented." *Timm v. Upjohn Co.,* 624 F.2d 536, 539 (5th Cir. 1980)(citation omitted), *cert, denied,* 449 U.S. 1112, 101 S.Ct. 921, 66 L.Ed.2d 40 (1981). Here, immediately following the objected to instruction, the jury was told that Gates' negligence action is based on the theory that an improper order was given and that having given the order Shell then had a duty to provide assistance to Gates. Taken as a whole, the instruction was not misleading.

[7] Shell also complains that the district court's instruction defining "order" constituted reversible error. The trial court has broad discretion to compose the instructions to the jury, as long as they are fundamentally accurate and not misleading. *See Smith v. Borg-Warner,* 626 F.2d 384, 386-87 (5th Cir. 1980); *Scheib v. Williams-McWilliams Co., Inc.,* 628 F.2d 509, 511 (5th Cir. 1980). We do not find the definition of order misleading. We think that the definition used by the trial court conveys the idea that an order is an authoritative communication by which the person addressed is directed to do something, and sufficiently conveys the imperative nature of a communication that would constitute an order. *See Webster's Third New International Dictionary* 1588 (1981).

IV. *Damage Award*

[8] Shell contends that the award of $180,000 for past lost wages and $435,000 for future lost wages is excessive and not supportive by the evidence. Its motion for a new trial on the issue of damages, and alternatively, remittitur, were denied by the trial court.

In reviewing a damage award, this Court is limited to determining whether the trier of fact abused its discretion. *Bartholomew v. CNG Producing Co.,* 832 F.2d 326, 331 (5th Cir. 1987). Damage awards will only be overturned in exceptional cases where such awards are so gross as to be contrary to right reason. *Thezan v. Maritime Overseas Corp.,* 708 F.2d 175, 182 (5th Cir. 1983)(citation omitted), *cert. denied,* 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed.2d 189 (1984).

At trial, Gates' economic expert arrived at an earnings base of $43,717.95 per year by annualizing Gates earnings for the first three months of 1982, the year the acci-

dent occurred. Using this figure, and guided by *Culver v. Slater Boat Co.*, 722 F.2d 114 (5th Cir. 1983), he determined Gates' past wage loss to be $209,267 and future wage loss to be $589,559. Although it did not present any economic evidence at trial, Shell now contends that the economist's calculations are speculative because he ignored Gates' earnings history prior to 1982 and did noto take into account the downturn in the oil industry or Gates' ability to do sedentary work. Based on its own calculations, Shell urges that the maximum allowable award for past and future wage loss is $119, 010 and $261,149, respectfully. We do not agree. The jury award is supported by the economist's testimony and is not an abuse of discretion.

V. *Prejudgment Interest*

[9] Relying on *Martin v. Walk, Haydel & Associates, Inc.*, 794 F.2d 209, 212 (5th Cir. 1986)(prejudgment interest on future damages not allowed in admiralty), the trial court granted Shell's post-trial motion disallowing prejudgment interest on the future damage award.

The OCSLA, 43 U.S.C. section 1333(a)(2)(A) provides:

> To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations ... the ... laws of each adjacent State ... are declared to be the laws of the United States.

There being no applicable federal statute or regulation, this Court has in OCSLA cases repeatedly allowed prejudgment interest on awards in accordance with LSA-R.S. 13:4203, which provides that "[l]egal interest shall attach from date of judicial demand on all judgments, sound-

ing in damages, 'ex delicto,' which may be rendered by any of the courts."[1] We have not, however, squarely addressed the issue of whether prejudgment interest is allowed for future damages, although we have affirmed awards of prejudgment interest on judgments that included future damages. *Bartholomew v. CNG Producing Co.*, 832 F.2d at 330-31; *Haas v. Atlantic Richfield*, 799 F.2d 1011, 1017-18 (5th Cir. 1986). Likewise, the Louisiana Supreme Court has affirmed an award of prejudgment interest on a judgment that included future damages. *Burton v. Foret*, 498 So.2d 706 (La. 1986). Louisiana appellate courts have uniformly held that prejudgment interest is awardable on future damages when applying LSA-R.S. 13:4203. *See, e.g., Tastet v. Joyce*, 531 So.2d 520, 523 (La.App. 5th Cir. 1988); *Lewis v. Macke Bldg. Services, Inc.*, 524 So.2d 16 (La.App. 5th Cir.), *cert. denied*, 532 So.2d 131 (La.1988); *Schackai v. Tenneco Oil Co.*, 436 So.2d 729, 735 (La.App. 4th Cir.), *cert. denied*, 440 So.2d 759 (La.1983); *Schwamb v. Delta Air Lines, Inc.*, 516 So.2d 452, 467 (La.App. 1st Cir. 1987); *see also In Re Air Crash Disaster Near New Orleans, La.*, 767 F.2d 1151, 1159 (5th Cir. 1985)(diversity case applying Louisiana law.)

In the face of our own prior decisions under the OCSLA allowing prejudgment interest on future damages, as well as unanimous Louisiana authority interpreting LSA-R.S. 13:4203 as allowing prejudgment interest on future damages, we find that prejudgment interest should have been awarded on Gates' entire award.

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[1] When applying the Louisiana law as "surrogate federal law" under the OCSLA, we have recognized that we may have "more discretion and broader authority in [our] evaluation, analysis, and application of state law to a given fact situation than an *Erie* court." *Knapp v. Chevron USA, Inc.*, 781 F.2d 1123, 1129 (5th Cir. 1986).

For the above reasons, we affirm the judgment below with the exception of the denial of prejudgment interest on future damages. We reverse and remand on that issue.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-3414

FILED
OCT 2 1989

Robert M. GATES, Plaintiff-Appellant,
Cross-Appellee,

v.

NORTHWEST INSURANCE COMPANY,
Intervenor-Cross-Appellee,

v.

SHELL OFFSHORE INC., (Substituted as Party Defendant for Shell Oil), Defendant-Appellee, Cross-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 29, 1989 , 5 Cir., 198__, _____F.2d____)
(OCTOBER 2, 1989)

Before POLITZ, DAVIS and DUHE, Circuit Judges

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ John M. Duhe, Jr.

United States Circuit Judge

APPENDIX C

§ 1333. Laws and regulations governing lands

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction

(1) The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exporing for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered

and enforced by the appropriate officers and courts of the United States, State taxation laws shall not apply to the outer Continental Shelf.

(B) Within one year after September 18, 1978, the President shall establish procedures for setting[1] any outstanding international boundary dispute respecting the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

(b) Longshore and Harbor Workers' Compensation Act applicable; definitions

With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act [33 U.S.C.A. § 901 et seq.]. For the purposes of the extension of the provisions of the Longshore and Harbor Workers' Compensation Act under this section—

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[1] So in original. Probably should be "settling".

(1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer any of whose employees are employed in such operations; and

(3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

(c) National Labor Relations Act applicable

For the purpose of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], any unfair labor practice, as defined in such Act, occurring upon any artificial island, installation, or other device referred to in subsection (a) of this section shall be deemed to have occurred within the judicial district of the State, the laws of which apply to such artificial island, installation, or other device pursuant to such subsection, except that until the President determines the areas within which such State law's are applicable, the judicial district shall be that of the State nearest the place of location of such artificial island, installation, or other device.

(d) Coast Guard regulations; marking of artificial islands, installations, and other devices; failure of owner suitably to mark according to regulations

(1) The Secretary of the Department in which the Coast Guard is operating shall have authority to promulgate and enforce such reasonable regulations with respect to lights and other warning devices, safety equipment, and other matters relating to the promotion of safety of life and property on the artificial islands, installations,

and other devices referred to in subsection (a) of this section or on the waters adjacent thereto, as he may deem necessary.

(2) The Secretary of the Department in which the Coast Guard is operating may mark for the protection of navigation any artificial island, installation, or other device referred to in subsection (a) of this section whenever the owner has failed suitably to mark such island, installation, or other device in accordance with regulations issued under this subchapter, and the owner shall pay the cost of such marking.

(e) Authority of Secretary of the Army to prevent obstruction to navigation

The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is hereby extended to the artificial islands, installations, and other devices referred to in subsection (a) of this section.

(f) Provisions as nonexclusive

The specific application by this section of certain provisions of law to the subsoil and seabed of the outer Continental Shelf and the artificial islands, installations, and other devices referred to in subsection (a) of this section or to acts or offenses occurring or committed thereon shall not give rise to any inference that the application to such islands and structures, acts, or offenses of any other provision of law is not intended.

(Aug. 7, 1953, c. 345, § 4, 67 Stat. 462; Jan. 3, 1975, Pub.L. 93—627, § 19(f), 88 Stat. 2146; Sept. 18, 1978, Pub.L. 95—372, Title II, § 203, 92 Stat. 635; Sept. 28, 1984, Pub.L. 98—426, § 27(d)(2), 98 Stat. 1654.)

APPENDIX D

TITLE 28

JUDICIARY AND JUDICIAL PROCEDURE

PART V—PROCEDURE—Continued

CHAPTER 125—PENDING ACTIONS AND JUDGMENTS

Sec.
1963. Registration of judgments of the district courts and the Court of International Trade.
[1963A. Repealed.]

1988 Amendment. Pub.L. 100-702, Title X, § 1002(b)(3), Nov. 19, 1988, 102 Stat. 4664, substituted in item 1963 "Registration of judgments of the district courts and the Court of International Trade" for "Registration in other districts"; and repealed item "1963A. Registration of judgments of the Court of International Trade".

§ 1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the

United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

(c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at the underpayment rate or overpayment rate (whichever is appropriate) established under section 6621 of the Internal Revenue Code of 1954 [26 U.S.C.A.§ 6621].

(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal circuit, at the rate provided in subsection (a) and as provided in subsection (b).

(3) Interest shall be allowed, computed, and paid on judgments of the United States Claims Court only as provided in paragraph (1) of this subsection or in any other provision of law.

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

(As amended Apr. 2, 1982, Pub.L. 97-164, Title III, § 302(a), 96 Stat. 55; Sept. 13, 1982, Pub.L. 97-258, § 2(m)(1), 96 Stat. 1062; Jan. 12, 1983, Pub.L. 97-452, § 2(d)(1), 96 Stat. 2478; Oct. 22, 1986, Pub.L. 99-514, Title XV, § 1511(c)(17), 100 Stat. 2745.)

APPENDIX E

R.S. 13:4203

§ 4203. Interest on judgments from judicial demand in ex delicto cases

Legal interest shall attach from date of judicial demand, on all judgments, sounding in damages, "ex delicto", which may be rendered by any of the courts.

No. 89-1154

Supreme Court, U.S.
FILED
FEB 7 1990
JOSEPH F. SPANIOL,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SHELL OFFSHORE, INC.,

Petitioner,

VERSUS

ROBERT GATES, TOTAL SERVICES, INC.
and NORTHWEST INSURANCE COMPANY,

Respondents.

GATES' OPPOSITION TO PETITION FOR CERTIORARI

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THE QUESTION PRESENTED FOR REVIEW

Is an award of prejudgment interest on future damages allowed in a tort case arising on a platform (an "artificial island") on the Outer Continental Shelf offshore Louisiana because the Shelf Act adopts Louisiana law which allows prejudgment interest in tort cases on all damages, both past and future?

43 U.S.C. § 1333(a)(2)(A); La. Stat. Anno., Rev. Stat. 13:4203.

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No. 89-1154

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

SHELL OFFSHORE, INC.,

Petitioner,

VERSUS

ROBERT GATES, TOTAL SERVICES, INC.
and NORTHWEST INSURANCE COMPANY,

Respondents.

GATES' OPPOSITION TO PETITION FOR CERTIORARI

Respondent ROBERT GATES respectfully requests that this Court deny the petition for certiorari, seeking review of the Fifth Circuit opinion in this case. That opinion is reported at 881 F.2d 215.

STATUTES INVOLVED

43 U.S.C. § 1333(a)(2)(A):

> To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent

> State, now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States, State taxation laws shall not apply to the outer Continental Shelf.

LSA-R.S. 13:4203:

> Legal interest shall attach from date of judicial demand, on all judgments, sounding in damages, *'ex delicto'*, which may be rendered by any of the courts.

REASONS FOR DENYING THE WRIT:

> SHELL'S PERCEIVED POLICY CONSIDERATIONS ARE IRRELEVANT, IF NOT ILLUSORY. THE PETITION PRESENTS NO POINT WORTHY OF REVIEW.

Hardly more than seven years ago the Circuit Court allowed the prejudgment interest provided by Louisiana law; Shell

sought review then; certiorari was denied.[1] Now Shell is back again for a second try, a "petition for rehearing" after a denial of *certiorari*, so to speak.

Shell complains now that the Circuit judgment here requires it to pay prejudgment interest on future damages. That judgment does because the Shelf Act adopts Louisiana law. That provides prejudgment interest on all elements of damages, past and future.

Shell does not complain because prejudgment interest was awarded on past damages. Its plea is that "this Court rule that in an Outer Continental Shelf Lands Act case a plaintiff is not entitled to prejudgment interest on an award of future damages." It does not contend that prejudgment interest should not be awarded at all. For it is settled Circuit law that prejudgment interest should be awarded in tort cases arising out of an accident occurring on a Shelf platform offshore Louisiana because such interest would be awarded onshore Louisiana; for Congress intended that the fellow hurt offshore be treated the same as the fellow hurt on shore, so far as practical.

Shell presents no novel issues here, no radical application, no unsettled questions. The Circuit Court had held in several cases in the past that laborers such as Gates were entitled to prejudgment interest, with no distinction made between past and future damages, because that is the settled Louisiana law.

Shell's complaint about this is apparently based on arguments concerning logic and policy. It seems to assert that the intent of Congress and the Louisiana Legislature should be

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1. *Olsen v. Shell Oil Co.*, 708 F.2d 976 (5th Cir., 1983), *cert. den.*, 464 U.S. 1045 (1984).

rejected because these statutes in this respect are unsound; "patently absurd"; that the validity of legislative acts should be judicially declared only when they are sage, not silly; that what Congress and the Louisiana Legislature did silly, this Court should make right by judicial legislation amending the two legislative acts; that the federal statute should be amended by this Court to say that state law shall be applied where not inconsistent but only where state law is wise and reaches the proper result; that no matter what Congress actually said, this Court should make it that way.

Shell made all of these arguments to a panel of the Circuit Court composed of experienced Louisiana lawyers and judges, who had no doubt about what the Louisiana law was or how it should be applied here.

Shell's argument here was unanimously rejected there and then unanimously rejected by the entire court upon Shell's move for rehearing *en banc*.

Shell then asked the Circuit Court to stay execution pending its petition for certiorari; again, the panel unanimously refused to do so; while it did not say why it refused, the only reason for declining to stay this simple money judgment was that it considered such a petition legally frivolous and, in a very real if not legal sense, presenting "no substantial federal question."

The Circuit Court's tone clearly shows that it felt the point routine and the conclusion foregone:

> In the face of our own prior decisions under the OCSLA allowing prejudgment interest on future damages, as well as unanimous Louisiana authority interpreting L.S.A.-R.S. 13:4203 as allowing prejudgment interest on future damages, we find that prejudgment

> interest should have been awarded on Gates' entire award.[2]

In terms of policy, Shell speaks sharply about a "patently absurd state law." We hope we reply to this as patiently and objectively as advocacy will allow.

Obviously, the Louisiana Legislature intended to bestow a relatively mild and minute punitive extra in tort cases as an element of substantive damage when it provided for such prejudgment interest. (For this is allowed only in tort cases, "judgments *ex delicto*.")[3]

It gives a little more than compensatory damages to the extent that it applies to all damages, past and future. It is substantive;[4] it is recoverable though the complaint fails to request it and the judgment fails to grant it; in effect, it is a substantive legislative award that "runs with the judgment," so to speak, though not mentioned anywhere in the suit;[5] so substantive that it is not varied after suit is filed by purportedly retroactive statutory amendments;[6] it runs from

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2. *Gates v. Shell Offshore, Inc.*, 881 F.2d 215 (5th Cir., 1989), at 218.

3. *Davis v. LeBlanc*, 149 So.2d 252 (La.App., 1963).

4. *Merchant v. Montgomery Ward & Co.*, 83 So.2d 920 (La.App., 1920); *New Amsterdam Cas. Co.*, 167 F.2d 767, *cert. den.*, 335 U.S. 822 (1948).

5. *Broome v. Gauthier*, 443 So.2d 1127 (La.App., 1983), *writ den.*, 462 So.2d 1251; *Cooley v. Allstate Ins. Co.*, 443 So.2d 1127 (La.App., 1983), *writ den.*, 462 So.2d 449.

6. *Hunter v. Laurent*, 158 La. 874, 104 So. 747 (1925); *Winzer v. Lewis*, 250 So.2d 650, *writ den.*, 259 La. 934, 253 So.2d 379 (1971; *Hebert v. Travelers Ins. Co.*, 245 So.2d 563 (La.App., 1971).

"judicial demand," the date suit is filed.[7] Again, it is limited to tortious conduct.[8] No distinction is made between past and future damages.[9]

Such an extra could have taken different forms, some much more onerous; it could have provided for double or triple damages; or punitive damages; or attorney's fees.

Instead, the Louisiana legislature provided, wise or not, this extra of prejudgment interest on all elements instead.

Some states, including Louisiana, have triple damages for trespass against timber, even accidentally; others, double damages for trespass against branded cattle, although in the best of faith.

But Louisiana has no punitive damages, by that name, (outside of drunken-driving and toxic-tort cases), no matter how wanton the injury may be.[10]

So, in Texas, Shell complains stridently to the federal courts about punitive damages on the Shelf: that it does not have to pay such damages when such an accident happens offshore Louisiana. Then, in Louisiana, it protests dramatically that it does not have to pay such prejudgment interest when the accident happens offshore Texas; trying to play one law, one state, off against the other to Shell's advantage.

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7. *Guidroz v. Tauzin*, 413 So.2d 682 (La.App., 1982).

8. *Davis v. LeBlanc*, 149 So.2d 252 (La.App., 1963).

9. *Schackai v. Tenneco Oil Co.*, 436 So.2d 729 (La.App., 1983), *writ den.*, 440 So.2d 759.

10. *Baggett v. Richardson*, 473 F.2d 863 (5th Cir., 1973).

Surely Louisiana workers would rather have the grand gain from punitive damages rather than the petty benefit from such prejudgment interest; but they cannot have it because the Louisiana Legislature, in its wisdom, saw fit to give them, but only in tort cases, a few nickels more prejudgment interest, instead, as a comparatively gentle punitive reminder to the wrongdoers of their "delects."

If the Louisiana Legislature said to Shell, *"All right, we agree with you; we made a mistake; we are going to repeal our law of prejudgment interest on future damages; but we are also going to adopt the concept of punitive damages, like they have got all along the Coast, in Texas, Mississippi, Alabama, Florida, for injured workers."* Can there be any doubt about Shell's reaction to that? Its yellow shell would blanch.

Punitive damages may look to some people, including Shell, as "patently absurd"; but they are awarded in Shelf Act cases offshore in all the states bordering the Gulf; all except one, Louisiana.

Gates' case has lasted eight years; two trials, two appeals, two petitions for rehearing, and now this petition for certiorari; maybe it would be better to give Gates a commensurate award of attorney's fees rather than a few nickels more prejudgment interest; but the Louisiana Legislature has not seen fit to do so.

Suppose Louisiana allowed no prejudgment interest whatever, and Gates argued "patent absurdity"; is there any doubt about Shell's reply?

Is Shell asking this Court to limit the adoption of state law to that which it considers wise? If so, on what basis? Judicial legislation; that is all Shell is asking for.

Prejudgment interest does tend to accumulate in Shell's cases, but it has the use of the money for years at a judicial rate, generally much better than the market; for Shell, the present case was over quickly; but it still probably saved money in the long run, even with prejudgment interest on all elements of damage; Shell does better in other cases, more like fifteen years:[11]

> Lest our silence be taken as expression of other than frustration, we pause to note the consumption of thirteen years to decide these cases, to date. It is not a pleasing story for counsel, court, or the Congress. This is too long for widows and children. Without attempting to assess blame for all the systemic cracks into which these cases fell, the snail's pace was not fair. At some point it ceases to be justice.

Mary Olsen v. Shell Oil Co., 708 F.2d 976 (5th Cir.1983), at 985.

Nor can Shell take any realistic comfort from the fact that the Circuit Court had to reverse the District on this point. Shell urged upon a busy District Court a fallacy well known to Shell at the time it did so: that since admiralty does not allow prejudgment interest on future damages, none should be allowed here in this case involving the *Lands Act*. Shell clearly saw the distinction but failed to point it out as it led the District Court into error. As the Circuit Court described it, *"Relying on Martin v. Walk, Haydel & Associ-*

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11. *Olsen v. Shell Oil Co.*, 595 F.2d 1099 (5th Cir., 1979), *cert. den.*, 444 U.S. 979; 561 F.2d 1178; *reh. den.*, 565 F.2d 163; 574 F.2d 194; *after remand*, 708 F.2d 976, *reh. den.*, 717 F.2d 1339; *cert. den.*, 464 U.S. 1045 (1984).

ates, Inc., 794 F.2d 209, 212 (5th Cir., 1986) (prejudgment interest on future damages not allowed in admiralty), the trial court granted Shell's post-trial motion disallowing prejudgment interest on the future damage award."

There appears to be no reason for certiorari: no conflict with another Federal Court of Appeals, nor with a state court of last resort; no departure from the accepted and usual course of judicial proceedings; no decision of an important question of federal law; no conflict with the federal Constitution; no conflict with applicable decisions of this Court; no substantial question of widespread national importance; and, actually, no substantial federal question at all.

Gates' case does not involve hazards to navigation, neither air nor sea; nor to seabed pipe lines; nor oil-gathering facilities, nor pollution; nor toxic waste; all concerns of the Secretary of Interior, the Secretary of Transportation, the Secretary of Commerce, the Coast Guard, and the Army Engineers.

This case is merely a common damage suit for a back injury arising out of an industrial accident; embracing nothing but settled points of law; and, even if they were unsettled, not of such a nature as to make them worthy of certiorari.

If Shell's complaint here were proper, it would amount to bare judicial error about a corollary of application so minutely capillary in dimension that it should be left at Circuit level since there is no Circuit conflict.

But the Circuit ruling is correct in every respect:

THE CIRCUIT COURT'S RULING IS CORRECT. IT IS BASED ON CONTROLLING PRECEDENT AND SETTLED LAW.

The Circuit Court held that Gates was entitled to prejudgment interest on all elements of recovery. That is the Louisiana law. And that law is adopted. It is not inconsistent because judge-made admiralty, maritime, or federal common law may be to the contrary.

The Shelf Act says that state law is "*hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands, and fixed structures erected thereon . . . .*"

Such state laws are declared to be the law of the United States "*to the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted . . . .*" 43 U.S.C. § 1333(a)(2)(A).

It is Shell's argument that when Congress talks about inconsistent federal law, it means judge-made federal law; and that since maritime law does not provide for prejudgment interest on future damages, that generates an inconsistency which bars the application of Louisiana law.

Three times in a long decade this Court had held to the contrary. *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969); *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); and *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981).

In cases involving death, contributory negligence, laches, this Court rejected arguments that conflicting maritime law could be used to create the inconsistency. *Gulf Offshore*, cited immediately above, 453 U.S. 487:

> In *Chevron*, we held that Louisiana rather than federal common law provided the federal

> statute of limitations for personal injury damages actions under OCSLA. We recognized that "Congress made clear provision for filling the 'gaps' in federal law; it did not intend that federal courts fill those 'gaps' themselves by creating new federal common law."

If federal common law or maritime law were the law Congress intended to create inconsistency, then the provision for adopted state law would be virtually nullified, for it is the nature of maritime and common law to grow to apply to every new situation.

The Circuit Court, in *Mary Olsen v. Shell Oil Co.*, 708 F.2d 976 (5th Cir., 1983) applied the teachings of these three precedents in holding that the Louisiana statute awarding prejudgment interest was applicable and not inconsistent. The *Olsen* decision has become settled law in the Circuit, *Bartholomew v. CNG Producing Co.*, 832 F.2d 326 (5th Cir., 1987); *Hass v. Atlantic Richfield*, 799 F.2d 1011 (5th Cir., 1986). As the Circuit Court held in *Olsen*, 708 F.2d 980:

> The implication of *Rodrigue* and *Huson* is that whenever an action is based on "surrogate" Louisiana law, . . . Louisiana law provides all aspects of the remedy. . . . Our view of the wisdom of a rule is not here the index of its application. That we view the rule as integral to a tort system is important here.

The federal statute concerning interest, 28 U.S.C., § 1961, covers post-judgment interest; but it does not say that there will be post-judgment interest and only post-judgment

interest in these Shelf Act Cases that incorporate state law.[12] As the Circuit Court held in *Frederick v. Mobil Oil Corp.*, 765 F.2d 442 (5th Cir., 1985), at 449:

> Finally, Mobil argues that the district court erroneously awarded prejudgment interest on the damages assessed by the jury. This argument is premised on the notion that the federal interest statue, 28 U.S.C. § 1961, [set forth in footnote] applies in this case and that it specifically precludes an award of prejudgment interest. This argument is foreclosed by *Olsen v. Shell Oil Co.*, 708 F.2d 976 (5th Cir. 1983), *cert. denied*, 464 U.S. 1045, 104 S.Ct. 715, 79 L.Ed.2d 178 (1984). In *Olsen*, we noted that our decisions on the award of prejudgment interest in OCSLA cases have not always reached uniform results. We sought there, however, to harmonize our decisions and to discern a path for future cases. For reasons that we need not repeat here, we held in *Olsen* that (1) section 1961 does not, as Mobil contends, preclude an award of prejudgment interest; (2) prejudgment interest is proper in an OCSLA case to the same extent that it is permitted by the law of the state that has provided, as surrogate federal law, the substantive rules of decision governing the case; and (3) in an OCSLA case applying Louisiana law, La.Rev. Stat. § 13:4203 provides adequate support for an award of prejudgment interest.

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12. "A federal statute, 28 U.S.C. § 1961, fixes the *post*-judgment interest rate for federal cases . . . . But prejudgment interest is governed by federal common law, [no adoption of state law being involved] . . . ." *Gorenstein Enterprises v. Quality Care-USA*, 874 F.2d 431 (7th Cir., 1989), at 436.

> *Olsen* controls this case, and we need not repeat its reasoning here. It is sufficient to note that Mobil's argument is based entirely on pre-*Olsen* cases that in *Olsen* were expressly distinguished or explained away.

Shell cites cases under the Jones Act and the FELA. The distinction is simple. Neither the FELA nor the Jones Act has a provision adopting state law. These Acts involve national and international arteries of commerce where uniformity is paramount.

Gates might not expect to get prejudgment interest under the FELA. But he would get prejudgment interest in a tort case if he were hurt onshore Louisiana in oil operations; and the clear intention of Congress, that the fellows on the platform offshore should get equal treatment, was the prime reason that Congress rejected maritime and federal common law.

Shell talks about the law of enclaves: there is a variety of such laws governing areas of federal proprietorship, federal territories, and Indian Country; some may have their own peculiarity that produces different results. But the provision about enclaves in the Shelf Act *adopts* state law.

If such adoption were applied upland Louisiana, it would simply mean that oil workers drilling a well on the prison grounds inside the federal penitentiary at Oakdale, Louisiana, would receive about the same treatment in their tort cases against parties such as Shell as those workers drilling for oil a hundred yards outside that prison.

Shell tries to make much of the fact that the Circuit Court had to reverse itself in *Olsen* to allow prejudgment interest under Louisiana law. But it reversed itself because it had gotten reversed when it tried before to apply decisional maritime law. So, it concluded that, "*Section 1961 [the*

Federal interest statute] does not by its silence bar the awarding of prejudgment interest . . . ." *Olsen*, above, at 708 F.2d 984.

If state law is to control such things as time limitations and instructions about income tax, as in *Huson* and *Gulf Offshore*, obviously state law applies on the question of prejudgment interest. And since it applies, it applies across the board in Louisiana because that is what its state law provides. As *Huson* held, 404 U.S. 103:

> Congress also recognized that the "special relation between the men working on these artificial islands and the adjacent shore to which they commuted" favored application of state law with which these men and their attorneys would be familiar. [Cases cited.] If Congress' goal was to provide a comprehensive familiar body of law, it would defeat that goal to apply only certain aspects of a state personal injury remedy in federal court. A state time limitation upon a remedy is coordinated with the substance of the remedy and is not less applicable under the Lands Act.

Chevron Oil Co. v. Huson, 404 U.S. 97 (1981), at 103.

Again, the idea that the fellow hurt offshore should be treated, so far as practical, as the fellow hurt on shore; this idea is also the thread of principle that has run through all of this Court's decisions concerning the adoption of surrogate law.

Shell admits that Gates is entitled to prejudgment interest on all elements of damages except future ones. That so, this is dead certain: The rationale that led the Circuit Court in *Olsen* to grant prejudgment interest; such rationale inevitably and necessarily leads to the Circuit conclusion that such

prejudgment interest covers all damage, past and future: this just as surely as night follows the sun.

And *Olsen's* conclusions are in full obedience to the ruling precedent that this Court laid down three times in eleven years.

When Shell admits that Gates is entitled to prejudgment interest, but claims that is limited to past damages, Shell virtually concedes that its petition is legally frivolous and that there is, in effect, no real substantial federal question.

Obviously when Congress adopted state law, it adopted state law whether good, bad, indifferent; strong or weak; sound or silly. The only exception is inconsistency. And that inconsistency is not created by judge-made maritime nor common law.

Shell is fair here, eminently fair. All it wants is a fair advantage. In the past, Shell has forcefully and successfully asserted on these "artificial islands" the state law of contributory negligence where the slightest neglect on the part of the injured worker totally barred his recovery; and the quick-fuse of the state limitations that blasts him out of the courtroom in a short twelve months where he had the flexible doctrine of laches before.

Now, the only thing more Shell asks is a rose without a thorn. If Louisiana law applies to liability, surely it applies to damages, including all elements of prejudgment interest.

The Circuit Court did nothing more here than to recognize state law; declare that the law is the law; and properly apply it as surrogate law here, as clearly mandated by this Court.

If Shell finds this distateful, it can do what the rest of us have to do, go to Congress, go to the Louisiana Legislature, go to both, and have the law changed. It has had seven years

since *Olsen* to do so, instead of trying to produce judicial legislation here, clearly against the will of Congress, as demonstrated by this Court.

If this had been a simple diversity case upland Louisiana, Gates would have been awarded such prejudgment interest as a matter of course. *Texaco, Inc. v. Lirette*, 410 F.2d 1064 (5th Cir., 1969). Surely, he should get the same off-shore Louisiana on an "artificial island" on the Shelf.

Shell's curious complaint is that the Louisiana laws of judicial interest and tort damages combine to put Shell at penny risk but keep it pound safe; this odd sort of alligator tears is found only along the Louisiana seaboard and its share of the Shelf. The Louisiana Legislature gives Shell the real break here, not Gates.

Suppose that Gates had begged the Shell man not make him pick up a heavy piece of equipment without some help, but the Shell man gave him a direct order to do so despite Gates' protest, and Gates got permanent spinal injury as thanks for his effort; on this the jury could have certainly found Shell's misconduct wanton; but such a finding would have been irrelevant since Louisiana law allows no punitive damages no matter how wanton, no matter how willful the misconduct of a tort defendant.

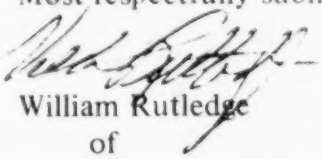
Finally, Shell protested to the Circuit Court that Gates was trying to make people like a state law about judicial interest that they should dislike; Gates is not trying to make anybody like anything.

But precedent is precedent; the law is the law, like it or not.

CONCLUSION

Review should be denied.

Most respectfully submitted,



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